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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1187~~ 23

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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To the United States Court of Appeals
For the Sixth Circuit.

Petitioner John Ruffalo, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 29, 1966.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals is reported in 370 F. 2d 447, and is printed in Appendix C hereto. Opinions of all the courts which have passed on the matter are appended in chronological order. The opinion of the Supreme Court of Ohio, reported in 176 Ohio St. 263, 199 N. E. 2d 396 (1964), is Appendix A. The first opinion of the District Court, reported in 249 F. Supp. 432, is Appendix B. The opinion of the Circuit Court of Appeals, reported in 370 F. 2d 447, is Appendix C. The second opinion of the District Court conforming to the Appellate instruction, not yet reported, is printed as Appendix D hereto. The decree of the Court of Appeals is printed as Appendix E.

JURISDICTION.

The decree of the United States Court of Appeals was entered on December 29, 1966, striking the name of petitioner from the roll of counsel permitted to practice before that court. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

There is a separate ground under which this Court should take cognizance of the subject matter. The petitioner, John Ruffalo, Jr., is a member of the bar of this Court, enrolled as a practitioner on October 24, 1960. Rule 8, of the Rules of The Supreme Court of the United States, provides that any member of its bar who has been disbarred from practice in any state or district will be forthwith suspended from practice before this Court, but then shall be afforded opportunity to show good cause why he should not be disbarred. Upon his response to the rule to show cause the Court will enter an appropriate ord . Although this Court has not yet taken notice of petitioner's disbarment below, it may do so upon this showing and may consider the brief herein as the showing of good cause by petitioner why he should not be disbarred from practice before this Court.

QUESTIONS PRESENTED.

The case presents two questions. One question is whether a lawyer representing an injured client in an FELA case against a railroad is entitled to pay another general employee of that railroad to find and interview witnesses, report track layouts, and operating practice, and otherwise investigate and report on the facts of the case, without being disbarred on that ground that secret investigation by an undercover agent is unethical.

The other question is whether a lawyer who has an extensive litigation practice, in a state which does not prescribe any form of record keeping as a condition of practice, is required to make book entries proving his innocence of solicitation or other wrongdoing, is required to preserve such records, and is required to produce them when investigated on pain of an inference of guilt justifying disbarment for failure to do so.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Amendment V, Constitution of the United States.

[*Rights of Persons*]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment XIV, Constitution of the United States.

[*Rights of Citizens*]

"*1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. U. S. C. Title 45, Section 60.

"*60. Voluntary furnishing of information not to be prevented.*—Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports."

4. Canons of Ethics, Canon 10.

"The lawyer *should not* purchase any interest in the *subject* matter of the litigation which he is conducting."

STATEMENT.

The petitioner was ordered indefinitely suspended from the practice of law by the Supreme Court of Ohio on May 20, 1964, on two findings of alleged misconduct. That order is final and is not here subject to review. Petitioner does not question the findings of fact as to his conduct, but insists that his conduct was not wrongful, nor unprofessional, nor indicative of any infirmity of fair character.

Thereafter the District Court of the United States for the Northern District of Ohio ordered the petitioner to show cause why he should not be disbarred in that court. The District Judge accepted the findings of fact of the Ohio Court but disagreed with its legal conclusion. He found there was no misconduct, and no reason to disbar petitioner, and refused to suspend him from practice.

The Court of Appeals for the Sixth Circuit in turn ordered petitioner to show cause why he should not be stricken from the roll of that Court on the basis of the state disbarment order. The Court of Appeals reviewed the record of the state disbarment proceedings and concluded, in the majority opinion, that one of the two charges did not justify discipline but that the lone charge of hiring an "undercover agent" did sustain the state court discipline and required petitioner's disbarment from practice before the Court of Appeals. The minority opinion of the Court of Appeals, dissenting, found that neither charge of misconduct on the conceded facts justified suspension from practice and approved the decision of the District Court.

The District Judge, in his first opinion, had announced that he would reconsider his conclusions after the determination by the Court of Appeals in its hearing. The Court of Appeals opinion admonished the court below that "it would be most unseemly, considering the record in the case, to have the United States Courts accepting for practice before them a lawyer who has, after due process, been suspended from practice in the courts of his own state."

Thereupon the District Court issued a second opinion stating "an abiding conviction" that its original findings and conclusions "were correct," but recognizing also that the orderly administration of justice compels a district court "to respect and defer to the opinions of its circuit court of appeals." By order effective March 11, 1967, Petitioner John Ruffalo, Jr. was suspended from practice before the District Court. (87a)

There is no factual dispute to reveiw. The only issue before the District Court and the Court of Appeals was the legal conclusion to be drawn interpreting conceded conduct. Under the applicable state practice a Board of Commissioners on Grievances and Discipline considered a total of fourteen charges of unethical conduct laid against petitioner. They found seven charges proved and seven unfounded. The Supreme Court of Ohio, which has final fact-finding power under its practice, reviewed the recommended findings and conclusions of the commissioners and found that only two charges were sustained. These two charges were the basis of the proceedings in the federal courts below. (1a) (9a) (28a)

One charge, denominated Charge No. 8, was that petitioner advanced money for living expenses to certain clients. It was found—without dispute—that during the pendency of two FELA wrongful death cases the petitioner

made small advances from time to time to the two needy widows, at their supplication, to help defray living expenses. Total loans to one widow, over a period of four years, amounted to $1,025; and to the other over a period of three and a half years amounted to $611. Both loans were repaid out of settlements finally obtained. In neither case was there a promise to make regular loans as a condition of employment. (32a) (81a)

At the time petitioner made the loans there were four Ohio Supreme Court decisions in earlier cases which held that it was proper for a lawyer, as an act of kindness, to make small loans to needy clients, and the overwhelming majority view in the United States held no breach of propriety in such practice. The Supreme Court of Ohio, reversing its earlier decisions, held that petitioner's conduct was "in effect" a purchase of an interest in the litigation and violated Canon 10 which reads: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

The District Judge found that this strained construction of Canon 10 was unwarranted, that loans made subject to obligation to repay are not per se unethical, and that petitioner's conduct in this respect did not constitute a ground for disbarment. (36a)

The Court of Appeals did not pass upon the validity of this charge, saying: "We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question." (58a)

The second charge against petitioner, which alone furnishes the basis for the petitioner's disbarment from the rolls of the Court of Appeals, is that the petitioner hired a railroad car inspector to act as his investigator in

preparation and discovery activities in his injury cases, some of which involved the railroad company general employer. The admitted facts under Charge No. 13 are that one Michael Orlando was a car inspector for the Baltimore & Ohio Railroad in his general employment. Petitioner hired Orlando to act as a free-lance investigator during his off-duty time, paying him $25.00 per day plus expenses. Petitioner had an extensive injury case practice which included many FELA cases. Some of these were against the Baltimore & Ohio Railroad, and Orlando investigated the facts in such cases. He had no access to any confidential information or defense files and breached no fiduciary duty, but he did have valuable information as to yard conditions, track layout, operating customs, and access to fellow-employee witnesses.

It was originally charged against petitioner that he also had hired Orlando to solicit cases for him. No such charge was sustained at any level of the proceedings. The Board of Commissioners themselves dismissed six out of the seven charges of solicitation as being unfounded. The Board did recommend that one charge of solicitation be found sustained, but the Supreme Court of Ohio in its review of the record found no preponderance of evidence to sustain it.

The Supreme Court of Ohio found that the employment of a railroad employee to investigate cases against his own employer per se was improper and unethical. The District Court held that per se it was not improper for an attorney to do so, and further found no evidence and no claim that petitioner caused Orlando to take unfair advantage of the Railroad nor that he attempted to influence testimony or engage in any unethical practice. (49a) (50a)

The Court of Appeals majority characterized the work

of Orlando as "espionage" and said: "We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

The minority opinion in the Court of Appeals holds it to be a fundamental violation of every principle of due process to disbar petitioner for alleged misconduct in hiring Orlando. The charge was added as a make-weight after the testimony as to Orlando's activities and pay had been taken. It was not included in the original charges. No Canon of Ethics can be found by any stretch of language to condemn or prohibit the practice. No case ever has held the hiring of investigative work from a non-fiduciary employee of a corporate defendant to be improper, any more than it would be improper to pay an employee for his time lost in submitting to an interview. In short, conduct apparently rightful at the time was held, ex post facto, to be wrongful and, in an astonishing transposition, it was held that petitioner should have known it was wrongful when he engaged in the conduct.

There is another issue in this case, related to a lawyer's record keeping, which likewise involves due process and the constitutional rights of lawyers. No clear finding was made on the issue, so that it did not become an official basis for the disbarment action, but both the Supreme Court of Ohio and the Circuit Court of Appeals stress it as a bolstering argument justifying discipline. In the state court proceedings written notice of the charges he was to meet were given to the petitioner, John Ruffalo, Jr. Extensive hearings were held on these charges. *After* the testimony had developed the use of Orlando as an in-

vestigator, the Board of Commissioners added the charge of unethical conduct in hiring Orlando as Charge No. 13, by oral motion, over the petitioner's strong objection. (43a) (84a)

Petitioner had testified that when he hired Orlando he wished to protect Orlando from reprisals from the Baltimore & Ohio Railroad, fearing they would fire Orlando if they knew he was doing part-time off-duty work as an investigator for Ruffalo. (The fear was justified—Orlando was fired.) Ruffalo paid Orlando in cash, kept a record of receipts until he closed his fiscal books and prepared Internal Revenue Form 1099's summarizing his annual total payments, at which time he destroyed the detailed receipts. He kept copies of the Form 1099 summaries, which he produced in response to subpoena.

The Chairman of the disciplinary investigating board then demanded that the petitioner, Ruffalo, produce "all his records of income and expense," "all his office records" and "all the records * * * relating to [his] financial transaction over the period of time." The petitioner, representing himself at the hearing, refused to produce all his financial records, as is noted in both the Supreme Court of Ohio and the Circuit Court of Appeals opinion.*

The State Supreme Court in its opinion asks (176 Ohio St. at 268): "Why did respondent not produce records to show what the payments were for?" The opinion

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* In the transcript of hearing before the Board of Commissioners on Grievance and Discipline of the Ohio Court, the refusal was in these terms:

> "I don't think they should have the right to just go down through my ledger and look at everything that is in my ledger. * * * I have the records here to establish my payments, and just to go down through my records here to find out what they can find out of any kind of any nature that they might try to throw against me here at this time and to amend their complaint on what I did here I don't think they should do that."

voices suspicion that perhaps there were records to show solicitation which otherwise could not be proved and draws the conclusion that the receipt records were destroyed "in order to prevent their use against Orlando in the proceedings brought against him by the B & O and against Ruffalo in the proceedings brought against him." (7a)(8a)

The Circuit Court of Appeals said in its opinion:

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have" (except the Form 1099's) "were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court, and this Court had, and have, *the right to draw inferences as to what this conduct portrays.* The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (64a)

These arguments made by the courts below to justify the disbarment present the issue of what records a lawyer engaged in a litigation practice is required to keep. This Court recently has held, in *Spevack v. Klein*, ____ U. S. ___, 35 U. S. L. Week 4140 (U. S. Jan. 16, 1967), that the Self-Incrimination Clause of the Fifth Amendment has been incorporated in the Fourteenth and extends its protection to lawyers as well as other individuals.

If a lawyer actually has solicited cases and actually has kept records to show it, he may assert his constitutional privilege and refuse to produce them. The privilege will "not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it."

It is clear that if the petitioner, Ruffalo, had in fact paid Orlando for soliciting and had in fact kept records,

he could have refused to produce them on constitutional grounds without incurring disbarment. In the instant case he insisted that he had kept only such records as Internal Revenue required, and had destroyed the detailed cash receipts. The Circuit Court of Appeals holding must mean that a lawyer who has a right to refuse to produce his records has no right not to keep them and has no right to destroy them.

On the basis of petitioner's "failure to carry transactions in his books, and his destruction" [before subpoena] "of what records he did have," the court below has said that: "The Ohio Bar, its Supreme Court and this Court had, and have, the right to draw inferences as to what this conduct portrays."

Such holding is an absolute denial of the privilege against Self-Incrimination and the Presumption of Innocence. It means that a lawyer is affirmatively required to post records detailing his innocence, is required to keep such records against the chance of some future investigation, and is required to suffer "inferences" of guilt if he fails to keep and produce them.

REASONS FOR GRANTING THE WRIT.

1. The Trial Bar Needs Guidelines for Permissible Conduct in Case Preparation.

The issue here presented is of vital concern to every practitioner at the federal bar. The essence of good trial work is thorough preparation. The decision below imposes stringent and arbitrary limits on the methods of preparation never before promulgated by any court or Canon.

Every lawyer who handles railroad cases knows that investigation of such cases presents special problems. The work of railroading is strange to an outsider. Railroaders speak in a jargon of their own, not overly intelligible to others. They are clannish men, not likely to talk freely to a stranger. Trial evidence concerning yard layout, equipment, and custom and practice demands that the witness be a man familiar with those matters, which necessitates calling employees from the yard of the railroad in question.

Obviously, the best man to investigate a railroad case is a railroader. The best man to investigate an admiralty case is a seaman. Zealous protection of the client's interest should compel a lawyer to hire the best investigator he can get. The Circuit Court of Appeals held that the lawyer can hire a Pennsylvania brakeman to investigate a case against the New York Central, but cannot hire a Baltimore & Ohio car inspector to investigate an injury case against the Baltimore & Ohio. The Court of Appeals said:

> "We cannot find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

We would argue that if he does not hire a yard employee to dig out vital evidence as to practices of that yard, the lawyer cannot adequately represent his client and may be guilty of culpable malpractice.

It is naive to suggest, as does the Court below, that "With the liberal use of our discovery practice, we consider that adequate preparation can be made without resorting to the methods chosen by Mr. Ruffalo."

Discovery interrogatories can only obtain answers based on the defense investigation. They do not reveal evidence the defense has not discovered, nor are answers to interrogatories always faithfully detailed and accurate. Good advance investigation not only helps the lawyer to frame his interrogatories and demands for production but also tests the accuracy of the official defense answers.

No Canon of Ethics condemns the practice of obtaining information from a *non-fiduciary* general employee. Canon 32 states that the lawyer should not render any service involving "corruption of any person or persons exercising a public office or *private trust.*" Michael Orlando, car inspector for the Baltimore & Ohio, exercised no private trust. Any conflict of interest between his on-duty work for his general employer and his off-duty work pertained only to Orlando and not to the petitioner, Ruffalo.

It is perfectly proper for the lawyer himself to interview the defendant's employees. He properly may interview *any* witness, not a party, without the consent of his opponent. The lawyer's right to interview railroad employees is protected by a special act of Congress. There used to be a standard rule forbidding the railroad employee from telling the truth to the attorney or the investigator for an injured fellow employee. He would be fired for talking to anyone but his own claim agent. Congress in-

tervened to prevent the intimidation of witnesses by enacting Section 60 of Title 45, U. S. C., which strikes down as void any rule designed to prevent employees of a common carrier from furnishing information to any person in interest as to the facts incident to the injury or death of any employee. The act further makes it criminal to attempt to discipline an employee for furnishing such information.

It is a valuable right, protected by federal statute, for the lawyer to interview witnesses. The effect of the decision below is to hold that the lawyer must exercise this right in person and cannot hire a fellow-employee of his own client to get the information.

Was it improper for Orlando to investigate cases when he was a general employee of the Baltimore & Ohio? The National Railroad Adjustment Board has expressly approved the practice, saying:

> "On the other hand there is no doubt whatever of the right of an employee, when off duty, to assist an injured employee or his representative in any manner including the gathering of evidence and so long as it is limited to the development of truth it cannot be regarded as disloyalty nor afford just grounds for discharge." Award No. 3624, 21 N. R. A. B. 63 (1st Div. 1939).

It is a strange result to hold that what Orlando properly could do himself and what petitioner properly could do himself became unethical when petitioner hired Orlando to do it.

2. The Independent Jurisdiction of the Federal Courts.

This Court laid down the test for review of a state court order of disbarment in *Selling v. Radford*, 243 U. S. 46, which holds that the state court's order constrains the

exclusion of the practitioner from the federal bar unless, upon intrinsic consideration of the state record, the federal court shall find:

> "(1) That the state procedure was wanting in due process,
>
> "(2) Comes to a clear conviction that the proof of facts relied on by the state court to establish want of fair character was so infirm that acceptance of the state court's conclusion thereon as a finality would be inconsistent with this court's duty, or
>
> "(3) Discovers some other grave and sufficient reason why this court could not disbar consistently with its duty not to take that action unless constrained under the principles of right and justice to do so."

Under Ohio practice the disciplinary Board of Commissioners may recommend findings of fact, but the ultimate decision as to the facts and the discipline will be made by the Ohio Supreme Court. The opinion of that court, quoted in full in Appendix A, recites the facts found.

The opinion finds two charges established. One charge was that petitioner made loans to two needy widows, described as "the advancement of living expenses * * * to enable a disabled client and his family to survive." (176 Ohio St. at 265) This was condemned as being "in effect" a purchase of an interest in the litigation. The Circuit Court of Appeals has found that this charge did not justify disbarment and petitioner will not elaborate upon it here. (3a)

The second charge found established was that "The respondent (petitioner here) conspired with * * * Orlando and paid Orlando money for preparing lawsuits against the Baltimore & Ohio Railroad which was Orlando's employer." (176 Ohio St. at 265) As to this the state court held that: "In our opinion, one who believes that it

is proper to employ and pay another to work against the interests of his regular employer is not qualified to be a member of the Ohio bar." (176 Ohio St. at 269) (8a)

The Circuit Court of Appeals, accepting this finding and reviewing only the legal conclusion, said that it "cannot find totally invalid the view" that one who hires such an investigator "does not exhibit the fair character and integrity which must be the mark of a lawyer." This Court can and should review that conclusion. It is a violent departure from principles of trial preparation established by long and widespread usage.

3. Disciplinary Action on the Present Grounds Would Inhibit Enforcement of Rights Under an Important Federal Statute.

The Federal Employers Liability Act is a federal statute of importance. Claimants under FELA are not to be prevented from putting forward their claim by local oddities. This Court has said that, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, C. & Y. R. Co.*, 342 U. S. 359, (1952). This principle is specifically applicable to disciplinary actions against lawyers. "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964). On this principle a contingent fee contract has been held proper in a Jones Act case even in a state which refuses to permit contingent fees in state-created litigation. *Greenberg v. Panama Transport Co.*, 165 F. Supp. 320, 324 (D. Mass. 1960).

The state court held that petitioner was guilty of misconduct in making occasional modest advances to widows, while their FELA claims were pending, for living expenses. Such a holding is contrary to that of every court which has spoken on the question, and was contrary to prior Ohio law. This Court ought to lay down reasonably clear rules of conduct it will require of those who have the privilege of practicing before it. For that purpose, the significance of the rule adopted by the Ohio court is that it will prevent impecunious FELA litigants who retain an Ohio attorney from obtaining the fair determination of their cause by a jury which Congress endeavored to guarantee them. Unless the injured or widowed can be advanced occasional monies with which to obtain the bare necessities of life, they have no choice but to accept "a quick and cheap settlement" of the sort which was a prominent abuse in the early history of the Act. See *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U. S. 1, 3 (1964). The penniless cannot afford the luxury of the law's delays.

The state court also held that petitioner was guilty of misconduct in employing, during his off hours, a railroad employee to investigate cases, some of which were against the railroad for which the employee worked. Such a rule would prevent the effective investigation, and thus the effective prosecution, of FELA claims. The railroads' claim departments have ready access to the witnesses and to the equipment and records involved in the accident, as well as a full understanding of the railroad operations which were being performed. Attorneys for plaintiffs must make their own investigation more circuitously. The only effective investigator for this purpose, as testimony showed at the state hearing, is a railroad employee. There is not the slightest evidence that Orlando peered into con-

fidential company records, or that he investigated for respondent during the hours he was being paid by the railroad, or that he trespassed upon company property. All that is shown is that during his off-duty hours he obtained information for the attorney, gave him information, and was paid for this service to the client. (45a)

The intention of the Congress in enacting Section 60 of Title 45, U. S. C., was "to see to it that an injured employee could readily obtain all the information from witnesses, particularly employees of the railroad company." *Dugger v. Baltimore & O. R. C.*, 5 F. R. D. 334, 336 (E. D. N. Y. 1946). To rule that attorneys for FELA plaintiffs cannot employ railroad men as investigators would thwart that purpose.

In the *Brotherhood of Railroad Trainmen* case, 377 U. S. at 7 n. 13, the Supreme Court cited with approval a statement by Justice Roger Traynor:

> "Given the primary duty of the legal profession to serve the public, the rules it establishes to govern its professional ethics must be directed at the performance of that duty. Canons of ethics that would operate to deny to the railroad employees the effective legal assistance they need can be justified only if such a denial is necessary to suppress professional conduct that in other cases would be injurious to the effective discharge of the profession's duties to the public. *Hildebrand v. State Bar*, 36 Cal. 2d 504, 522, 225 P. 2d 508, 519 (1950)."

The conduct of respondent condemned by the lesser courts in the present proceeding is not a commercialization of the legal profession and it is not "ambulance chasing." Six of the original seven charges of solicitation were dismissed by the Board because they were not supported by the evidence, and the Supreme Court of Ohio, being in disagreement as to the facts, found the seventh and final

charge unproved. What is challenged here is the fair and effective preparation and prosecution of FELA claims. This case is another skirmish in what properly has been described as "the struggle of railroad workers to achieve the vindication of their legal rights in the face of the determined opposition of the employing railroads." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283 (1965).

4. The Grounds Relied on For Disbarment of Petitioner Are so Arbitrary and Irrational That to Act on These Grounds Would Deny Petitioner Due Process of Law.

There are constitutional limits on the generally broad control a court has over those permitted to practice before it. It has been held that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 439 (1963). "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U. S. 232, 239 (1957). For purposes of this rule, there is no constitutional distinction between denial of admission to the bar and disbarment. *Cohen v. Hurley*, 366 U. S. 117, 123 (1961). Such limitations on the states apply *a fortiori* to a federal court when it considers disbarment of one of its attorneys.

The grounds on which respondent was indefinitely suspended from the practice of his profession in the state courts, and which are advanced in the present proceeding, are arbitrary grounds, bearing no rational connection to

his fitness or capacity to practice law. "While it is true that a professional standard is not to be judged by lay understanding, it also is true that when a practice, which is reasonable from the layman's point of view, runs afoul of a professional standard the burden of justification is on the profession. It is not met by a mere reiteration of a rule." Schwartz, *Group Legal Services in Perspective*, 12 UCLA L. Rev. 279, 283.

Ohio had held in *Reece v. Kyle*, 49 Ohio St. 475, 31 N. E. 747 (1892) in *Scheinesohn v. Lemonek*, 84 Ohio St. 424, 95 N. E. 913 (1911); in *Roberts v. Montgomery*, 115 Ohio St. 502, 154 N. E. 740 (1926); and in *Cleveland Ry. Co. v. Godfrey*, 28 Ohio Law Rptr. 466 (Ohio App. 1928), that it was proper for an attorney to advance both litigation expenses and loans to the needy on a promise to repay. In reaching a contrary result in petitioner's case the Supreme Court of Ohio noted that these cases were all decided before the court, in 1952, adopted by rule the Canons of Professional Ethics, and said: "In view of the adoption of those canons, those cases would no longer be applicable to the extent that they are inconsistent with provisions of the canons." 176 Ohio St. at 265, 199 N. E. 2d at 398-399. (3a) (4a)

Nothing in the canons gives fair notice that they are changing a well-settled body of Ohio law and an established doctrine fully developed in the cases elsewhere. It is true that Opinion 288 of the Committee on Professional Ethics and Grievances of the American Bar Association, delivered in 1954, and published 41 A. B. A. J. 30 (1955), condemns advances, though under circumstances more aggravated than those involved in this case. But it would be surprising doctrine that the opinion of a committee of a voluntary bar association, issued *after* the Canon of Ethics had been adopted in Ohio, should be deemed to

override the decisions of the courts of Ohio and of other states. An Ohio commentator, writing subsequent to Opinion 288, did not recognize that such a change had occurred. He wrote: "It should be made clear, however, that the mere loaning of money to a client is not objectionable, per se. * * * The loan is objectionable when used as a means of securing a client." Note, 16 Ohio St. L. J. 114, 116 (1955). To hold that the advances made by petitioner constituted professional misconduct would be an unforeseeable and retroactive expansion of the rules regulating the conduct of Ohio attorneys.

The situation is even worse with regard to Charge 13, for here there is not even a Bar Association Committee opinion which arguably gave notice, nor any Canon which colorably can be cited as prohibiting the conduct there involved. The Board of Commissioners thought that the employment of Orlando violated Canons 29 and 32 of the Canons of Professional Ethics of the American Bar Association, without indicating which of the broad generalities of those two canons it deemed in point. The Supreme Court of Ohio simply said that "In our opinion" such conduct was wrongful, without pointing to any canon or rule of court claimed to have been violated. This is government by the length of the chancellor's foot, rather than government by law.

Even if this Court should think it undesirable for lawyers to make advances to clients or to hire railroad employees as investigators, it by no means follows that petitioner should be disbarred. The sounder course, the only constitutionally permissible course, is that followed by the Illinois Supreme Court in the case of *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 398, 150 N. E. 2d 163, 168 (1958). The court there held that the regional counsel plan of the Brotherhood was improper. An earlier

decision by an intermediate appellate court had approved the plan. The Supreme Court said that because of the earlier decision, "proceedings looking toward the imposition of discipline should not be pursued." If this Court should agree with the state court that petitioner's activities were improper—and we earnestly urge that it should not—it could announce by its opinion in this case its understanding to this effect. Petitioner, and all others admitted to practice here, could then guide their future conduct accordingly. To apply to this petitioner standards of conduct which could not fairly have been anticipated, and to punish him for violating those standards, would be "at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Pierce v. United States,* 314 U. S. 306, 311 (1941). This Court should act on the premise that attorneys, like all others, are protected by the Fifth and Fourteenth Amendments against punishment except for conduct which has been defined in advance as improper and unethical or is so patently immoral that every reasonable practitioner would know it.

It is settled that penal statutes must give fair notice of what it is which is commanded or forbidden. *Connally v. General Construction Co.,* 269 U. S. 385 (1926); *Lanzetta v. New Jersey,* 306 U. S. 451 (1939); *Musser v. Utah,* 333 U. S. 95 (1948). This requirement is violated by a statute too vague on its face, and it is violated also when a statute, seemingly narrow and precise, is unforeseeably and retroactively expanded by judicial construction. *Boule v. City of Columbia,* 378 U. S. 347, 352 (1964). For almost a century it has been established that disbarring a lawyer from the practice of his profession, though done to protect the public rather than with the intent of punishing the lawyer, has the effect upon him of punishment, and

that laws with such an effect must meet the tests applicable to a penal statute. *Ex parte Garland,* 4 Wall. 333 (1867).

This Court has referred to "the undeniably correct premise that a State may not arbitrarily refuse a person permission to practice law * * *." *Cohen v. Hurley,* 366 U. S. 117, 122-123 (1961). To disbar petitioner would be contrary to that premise.

5. Petitioner's Disbarment Has Denied Him Due Process of Law.

Petitioner was entitled to claim the constitutional guarantees of due process, even though he was a lawyer. The point is preserved for presentation to this Court in that Point 3 of his Response to Order to Show Cause in the Circuit Court of Appeals stated:

> "3. Disciplinary action against respondent on the grounds relied on by the Supreme Court of Ohio would abridge his right to fair warning of the permissible bounds of professional conduct, and would deny him due process of law." (TR. RES. BRIEF, P. 1)

The Circuit Court of Appeals, in following the findings of the Ohio court, found that one charge which established lack of fair character was Charge No. 13 relating to the hiring of Orlando. No such charge had been preferred against petitioner when the Ohio disciplinary hearings had begun and he had undertaken to appear pro se to defend himself. It was only after the testimony had been fully developed, concerning the hiring of Orlando as investigator, that Charge No. 13 was added on the oral motion of the Chairman of the hearing. The hearing Board then demanded that he produce all of his financial records and particularly full records of all transactions with Orlando. It is clear that petitioner was required to produce

records to prove he had *not* hired and paid Orlando as a solicitor of cases.

Petitioner had made records only of cash paid, and these limited records he had destroyed after the information was reported on Internal Revenue Form 1099. For this conduct petitioner was condemned by both the Ohio Supreme Court and the Circuit Court of Appeals. Although Ohio has no statute or rule of court which prescribes any form of record keeping, the Ohio Supreme Court said:

> "If the respondent did not know it was wrong to do this" [hire Orlando] "why did he try to cover it up. * * * Why did respondent not produce records to show what the payments were for? The evasive attempts of both Ruffalo and Orlando to explain their lack of records * * * arouses a strong suspicion that those records would have been damaging to both Ruffalo and Orlando. * * * It is almost impossible to reach any reasonable conclusion that the records of either, at least for 1961, were not destroyed in order to prevent their use against * * * Ruffalo in the proceedings brought against him." (176 Ohio St. at 268-269.) (7a)(8a)

The Court of Appeals for the Sixth Circuit adopted the rule of guilt by suspicion and inference, saying:

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry those transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this Court *had, and have, the right to draw inferences as to what this conduct portrays.* The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping?" (Emphasis supplied.) (64a)

These statements show absolute disregard for Ruffalo's constitutional rights. Let us assume for purpose of argument that Ruffalo was really guilty of solicitation through Orlando. If he were, then he had his Fifth Amendment right, absorbed into the Fourteenth, to refuse to produce them. If he did refuse, then no inference could be drawn therefrom and the penalty of disbarment could not be inflicted as the price of asserting the privilege.

If Ruffalo had a right not to produce any records he certainly had the corollary right to destroy any records he did have. If he had a right to destroy them, he must certainly have the right not to create self-incriminating records in the first instance.

The privilege against Self-Incrimination must include the right not to make records and not to keep records, as well as the right not to produce them. If Ruffalo were really guilty of solicitation, then no suspicion of guilt or inference of guilt drawn from a destruction of receipts or a failure to keep detailed financial records could justify his disbarment.

Assume on the other hand that Ruffalo is as innocent of the unproved charge of solicitation as he insists he is. When demand for the records was made he refused, properly, to produce his general financial records, and said that any detailed records as to Orlando were either never in existence or were, in the case of the cash receipts, destroyed. If he denies guilt, is he required to produce records to prove affirmatively his innocence? This would lead to the incredible result that constitutional immunities protect only the guilty and not the innocent.

Petitioner's failure to create and preserve records to prove his innocence cannot give the United States Court of Appeals the right it claims "to draw inferences as to what this conduct portrays."

CONCLUSIONS.

A writ of certiorari should be issued in this case so that this Court may outline for the trial bar reasonable guidelines as to the bounds of permissible conduct in the investigation and preparation of contested cases; and so that the constitutional rights of lawyers as a class may be illuminated and preserved.

Respectfully submitted,

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